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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

EARL GRAHAM WARD III,

Defendant and Appellant.

2d Crim. No. B239670  
(Super. Ct. No. 1353405)  
(Santa Barbara County)

Earl Graham Ward appeals the judgment entered after he pled no contest to two counts of grand theft by embezzlement (Pen. Code,<sup>1</sup> § 487, subd. (a)). Appellant was sentenced to 16 months in state prison and ordered to pay a total of \$126,159.63 in victim restitution. The trial court also ordered him to pay \$500 in attorney fees pursuant to section 987.8. Appellant contends the evidence is insufficient to support the attorney fee order. In response, the People acknowledge the court did not hold a hearing on the issue of attorney fees and made no express finding on appellant's ability to pay. They claim, however, that the court implicitly made such a finding and that there is sufficient

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<sup>1</sup> All further undesignated statutory references are to the Penal Code.

evidence in the record to support that finding. We agree with appellant.<sup>2</sup> Accordingly, we shall reverse the attorney fee order and remand for further proceedings.<sup>3</sup>

Section 987.8 provides in relevant part that in "any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court . . . the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. . . . The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided." (§ 987.8, subd. (b).) "If the court determines that the defendant has the present ability to pay all or a part of the cost, the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county . . . ." (§ 987.8, subd. (e).)

For purposes of section 987.8, "[a]bility to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant's present financial position. [¶] (B) The defendant's reasonably discernable future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernable future financial position. Unless the court finds

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<sup>2</sup> The People do not contend that appellant forfeited or waived his right to challenge the attorney fee order by failing to object below. In any event, appellant's claim that the evidence is insufficient to support the order can be raised for the first time on appeal. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397; see also *People v. Viray* (2005) 134 Cal.App.4th 1186, 1215 ["We do not believe that an appellate forfeiture can properly be predicated on the failure of a trial attorney to challenge an order concerning *his own fees*"].)

<sup>3</sup> In light of our remand, we need not address appellant's claim that the restitution order and abstract of judgment should be corrected to reflect the proper amount of restitution awarded on count 3.

unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense." (*Id.* at subd. (g)(2).)

Because appellant was sentenced to state prison, the court could not order him to pay attorney fees absent a finding of unusual circumstances. (§ 987.8, subd. (g)(2).) Moreover, such a finding had to be express, i.e., it cannot merely be implied. (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537.) No express finding of unusual circumstances was made here, nor would anything in the record support an implicit finding. Although the People correctly note that appellant made a substantial amount of money prior to his conviction, he has since declared bankruptcy. Presumably, any assets he may retain after the bankruptcy will have to be liquidated in order to pay the \$126,159.63 in victim restitution that was also ordered. Indeed, the probation department found that appellant did not have the present ability to pay any fines or fees in addition to restitution; nothing in the record would indicate otherwise.

Because the evidence is insufficient to support the attorney fee order, the order must be reversed. Appellant contends that this should be the end of the matter, while the People contend the case should be remanded for further proceedings to determine appellant's ability to pay. We agree that remand is appropriate. (*People v. Pacheco, supra*, 187 Cal.App.4th at p. 1404.)<sup>4</sup>

#### DISPOSITION

The judgment is reversed as to the \$500 attorney fee order. The matter is remanded for further proceedings to determine whether, in accordance with section

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<sup>4</sup> We note that any determination of appellant's ability to pay attorney fees cannot be based on his financial condition at the time of the hearing on remand. Rather, it must be based on his financial condition at the time of sentencing or no later than six months thereafter. (§ 987.8, subd. (g)(2)(B); see *People v. Flores* (2003) 30 Cal.4th 1059, 1062.)

987.8, appellant has the ability to pay attorney fees. The clerk of the superior court is further directed to correct the minutes to delete this fee. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Edward Bullard, Judge  
Superior Court County of Santa Barbara

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